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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN R. BURNS,

Defendant and Appellant.

B290627

(Los Angeles County
Super. Ct. No. LA085735)

APPEAL from a judgment of the Superior Court of
Los Angeles County. Joseph A. Brandolino, Judge. Affirmed.

Robert A. Werth, under appointment by the Court of
Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief
Assistant Attorney General, Lance E. Winters, Assistant
Attorney General, Scott A. Taryle, Nancy Lii Ladner, and
David E. Madeo, Deputy Attorneys General, for Plaintiff and
Respondent.

The Los Angeles County District Attorney's Office charged defendant and appellant John R. Burns with hit and run driving resulting in injury (Veh. Code, § 20001, subd. (b)(1)). The information further alleged that defendant had five prior serious and/or violent felony convictions and three prior prison terms (Pen. Code, §§ 667, subds. (b)-(j), 667.5, subd. (b)). A jury convicted defendant of the offense, and defendant admitted the prior strike convictions and prison terms. The trial court sentenced defendant to a total term of four years four months, imposed consecutively with a sentence in a different case, consisting of one-third the midterm of eight months for the offense, doubled for the prior strike, and three years for the three prior prison terms. Various fines and assessments were also imposed.

Defendant timely appealed. He argues: (1) The trial court committed reversible error when it barred defense counsel from impeaching a witness by asking if she was a prostitute; and (2) The trial court improperly imposed assessments and a restitution fine on an indigent defendant without first finding his ability to pay.

We affirm.

FACTUAL BACKGROUND

I. Prosecution's Case

On October 17, 2016, at around 1:30 p.m., Marilyn Pangilinan (Pangilinan) and her husband went to a restaurant in an outdoor shopping center. At the time, Pangilinan was about 72 years old and of Filipino descent. According to Monica Rendon (Rendon), who had called in sick to work that day and was picking up food in the shopping center, defendant quickly pulled into the shopping center parking lot and parked. He tried to go

to a marijuana dispensary, but it was closed. Looking a little irritated or mad, defendant walked back to his car, a dark blue Audi with dark tinted windows and a paper license plate, and got into the driver's seat. Rendon was able to get a really good look at defendant when he passed her car and returned to his car. No one else got in or out of the Audi.

Pangilinan began to cross the parking lot. Defendant quickly backed his car out of his parking spot and hit Pangilinan with his car. People rushed to her aid as she was on the ground. Defendant pulled into a parking spot for about seven to 10 seconds. He then sped away, driving around another car that was waiting to exit the parking lot, causing oncoming traffic to honk.

At around 4:00 p.m., defendant went to the motel where his fiancé at the time, Kamyn R. (Kamyn), and another woman, Haylie R. (Haylie), were. He told Kamyn that he had hit an older Asian lady with his car. He asked her to dye his hair from blond to black in case the police were looking for him. She did.

Due to the accident, Pangilinan suffered several injuries all over her body. She was hospitalized for eight days and in in-patient physical therapy for about seven weeks. The lasting effects of the injuries greatly impacted her mobility.

Los Angeles Police Department officers spoke with defendant in February 2017. When asked about a "traffic collision that occurred" in October 2016 where he "backed over a little Asian lady," defendant said that he did not remember it.

II. Defense

Defendant testified that he was present during the accident, but that his brother was driving the car. He was in the passenger's seat, and Kamyn and Haylie were in the back seat.

Defendant and his brother are sometimes mistaken for twins, even though they are two years apart in age. They are both tall and have full-sleeve tattoos on their arms. Defendant did not know where his brother was at the time of trial.

DISCUSSION

I. The trial court did not abuse its discretion in excluding questions about Kamyn's occupation as a prostitute

Defendant argues that the trial court erroneously excluded defense counsel's cross-examination into Kamyn's occupation as a prostitute.

A. Procedural background

Kamyn testified as the prosecution's rebuttal witness. She testified that she was not with him on October 17, 2016, during the daytime as defendant had testified. Rather, he returned to their motel that evening requesting that she dye his hair because he "ran over" an older Asian lady. On cross-examination, defense counsel asked Kamyn what her occupation was. She responded, "I'm an escort. You want to know what I do? I have no problem with that." The prosecutor's objection was sustained.

At sidebar, defense counsel sought to ask Kamyn if she was a prostitute and if she was engaged in prostitution in the last week. The trial court found that her occupation was not relevant, and, as related to moral turpitude, it did not survive an Evidence Code section 352 analysis.

The parties also discussed at sidebar that the trial court had previously excluded impeaching defendant with his felony

convictions for human trafficking and pimping, in which Kamryn was a victim.¹

B. Relevant law and analysis

Admission of acts of dishonesty or immoral character for impeachment purposes, like all evidence, is subject to Evidence Code section 352. (*People v. Wheeler* (1992) 4 Cal.4th 284, 296.) The trial court has broad discretion to exclude relevant evidence “if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352; *People v. Waidla* (2000) 22 Cal.4th 690, 724.) But when those acts offered for impeachment have not amounted to a felony conviction, problems of proof, unfair surprise, and moral turpitude evaluation arise. (*People v. Wheeler, supra*, at p. 296.) Thus, courts “should consider with particular care” whether their admission might involve undue time, prejudice, or confusion which outweighs its probative value. (*Ibid.*) The trial court may also take “fairness, efficiency, and moral turpitude” into account when deciding under Evidence Code section 352 whether to admit evidence other than felony convictions for impeachment. (*People v. Wheeler, supra*, at p. 297, fn. 7.)

¹ Defendant appealed his conviction of human trafficking of a minor for a commercial sex act, pimping, possession of a firearm by a felon, human trafficking to commit pimping, and dissuading witnesses from testifying, and his sentence of 172 years to life in state prison. On February 14, 2019, we affirmed the judgment, although we remanded the matter to allow the trial court to exercise its discretion regarding part of defendant’s sentence. (*People v. Burns* (Feb. 14, 2019, B286615) [nonpub. opn.].)

Here, asking Kamyn if she was a prostitute would have provided very little probative value given that she already told the jury that she was an escort. And, it would have been highly unfair to allow defense counsel to impeach Kamyn with her alleged involvement with prostitution but prohibit the prosecutor from impeaching defendant with his pimping convictions and/or pimping conduct related to Kamyn.

Moreover, asking Kamyn if she had engaged in acts of prostitution in the past week would have created an undue consumption of time and danger of undue prejudice, confusion of issues, and misleading the jury. In order to define “acts of prostitution,” defense counsel would have had to ask Kamyn questions about her alleged advertisements and any communication she had through them. This line of questioning would have distracted the jury from the issues at hand. And, the questioning would have been unduly prejudicial—the more detail revealed, the more the jury would have been able to consider Kamyn’s character negatively, even though those actions were not directly reflective of her veracity. (*People v. Phillips* (1985) 41 Cal.3d 29, 49 [“Permitting the defense to elicit testimony from [a witness] that she engaged in acts of prostitution had an obvious potential for embarrassing or unfairly discrediting her. . . . The degrading impact of such questions has long been recognized”].)

In light of its low probative value and the unfairness of its admission, the trial court did not abuse its discretion in excluding further questioning into Kamyn’s prostitution. Any probative value of that evidence was outweighed by the probability of undue consumption of time and the substantial danger of undue prejudice, confusion of issues, and misleading the jury.

C. Harmless error

Even if the trial court had erred in excluding further questioning of Kamyn regarding her occupation, which it did not, any claimed error would have been harmless. It is not reasonably probable that a result more favorable to defendant would have been reached in the absence of the alleged error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

The evidence of defendant's guilt was overwhelming. It is undisputed that defendant's car hit Pangilinan and that defendant was present at the accident. The only issue raised was whether defendant or his brother was driving the car. And the evidence here amply demonstrated that defendant was the driver. Rendon testified in great detail about the accident. She saw defendant get into the driver's side of the vehicle, and she never saw anyone else get in or out of the car. And a few months after the incident, in January 2017, Rendon identified defendant from a six-pack of photographs.

Regarding defendant's assertion that it was his brother (and not him) driving the car, defendant was not credible. When he was questioned about the accident in February 2017, he told officers that he did not remember the accident. Over one year later, in March 2018, he testified that his brother was the one who was driving the car when it hit Pangilinan. And, defendant's credibility was impeached with eight felony convictions, including three recent convictions reflecting dishonesty, a 2015 conviction for police evasion and two 2016 convictions for witness intimidation. In light of defendant's poor showing of honesty, it is not reasonably probable that the jury would have credited defendant's testimony over Rendon's.

In his opening brief, defendant asserts that part of his defense strategy was predicated on discrediting Kamyn's testimony in three ways: portraying her as a disgruntled ex-girlfriend, pointing out that she would financially benefit if defendant was convicted, and attacking her credibility through her admission that she was a prostitute. There is no evidence or argument that defendant was precluded from raising two of these challenges to Kamyn's credibility. In fact, defendant did argue that she was a disgruntled ex-girlfriend who "hate[d] him" and who stood "to make a lot of money" if defendant were to be convicted. Thus, defendant was able to challenge Kamyn's credibility and leave it to the jury to decide whether to believe her. It is highly unlikely that the additional piece of evidence (that she was working as a prostitute) would have altered the jury's decision.

Finally, defendant claims that "Rendon's testimony could have been challenged based on her illness which likely affected her mental acuity that day, her lack of familiarity with [defendant], and the similarity in appearance between [defendant] and [his brother]. Moreover, Rendon's testimony that [defendant] entered the driver side door of the Audi could have been challenged because observations were made through a mirror, and the vehicle had four doors creating the possibility [defendant] entered the rear seat of the vehicle." Defendant offers no explanation as to why these challenges could not have been raised, even after the trial court made its evidentiary ruling. And, we are left to wonder what Kamyn's occupation as a prostitute had to do with any challenge that defendant could have leveled to Rendon's mental acuity?

II. *The trial court properly imposed fines and assessments*

In a supplemental brief filed February 19, 2019, defendant argues that the trial court erred in imposing a \$30 court facilities assessment (Gov. Code, § 70373), a \$40 court operations assessment (Pen. Code, § 1465.8), and a \$300 restitution fine (Pen. Code, § 1202.4) without first determining that he is able to pay, in violation of his right to due process. In support, he relies upon *People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1163–1173 (*Dueñas*).

We are not convinced. First, as pointed out by the People, defendant forfeited his challenge to the trial court’s imposition of any assessments. (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153–1155 [Because “*Dueñas* applied law that was old, not new,” the argument was foreseeable].) Even before *Dueñas*, a trial court could consider a defendant’s inability to pay. (See, e.g., *People v. Trujillo* (2015) 60 Cal.4th 850, 853–854; *People v. Nelson* (2011) 51 Cal.4th 198, 227; *People v. Avila* (2009) 46 Cal.4th 680, 729.) Yet defendant did not object or otherwise raise his concern about an alleged inability to pay the assessed amounts. As a result, the issue has been forfeited on appeal. (See, e.g., *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468–1469.)

Setting aside this procedural obstacle, defendant still offers no basis for reversal. Based on the constitutional guarantees of due process and excessive fines, *Dueñas* held that trial courts may not impose three of the standard criminal assessments and fines—namely, the \$30 court facilities assessment (Pen. Code, § 1465.8), the \$40 court operations assessment (Gov. Code, § 70373), and the \$300 restitution fine (§ 1202.4)—without first ascertaining the “defendant’s present ability to pay.” (*Dueñas*,

supra, 30 Cal.App.5th at pp. 1164, 1172, fn. 10.) We need not decide whether we agree with *Dueñas* because defendant is not entitled to a remand even if we accept *Dueñas*. That is because the record in this case, unlike the record in *Dueñas*, indicates that defendant has the ability to pay the assessments and fines imposed in this case. A defendant's ability to pay includes "the defendant's ability to obtain prison wages and to earn money after his release from custody." (*People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837; *People v. Gentry* (1994) 28 Cal.App.4th 1374, 1376.) Prisoners earn wages ranging from \$12 per month (for the lowest skilled jobs) to \$72 per month (for the highest). (Cal. Dept. of Corrections & Rehabilitations, Operations Manual, §§ 51120.6, 51121.10 (2019).) At these rates, given the length of defendant's sentence in both this case and *People v. Burns, supra*, B286615, he will have enough money to pay the assessments and fines.

Even if defendant does not voluntarily use his wages to pay the amounts due, the state may garnish between 20 and 50 percent of those wages to pay the restitution fine. (§ 2085.5, subds. (a) & (c); *People v. Ellis* (2019) 31 Cal.App.5th 1090, 1094.) Because defendant "points to no evidence in the record supporting his inability to pay" (*People v. Gamache* (2010) 48 Cal.4th 347, 409), a remand would serve no purpose.

DISPOSITION

The judgment is affirmed.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ